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No. 257.

Supreme Court of the United States

OCTOBER TERM, 1901.

ARTHUR E. MUELLER, TRUSTEE IN BANKRUPTCY OF EDWARD B. NUGENT, BANKRUPT, . . . Petitioner,

vs.

WILLIAM T. NUGENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR ARTHUR E. MUELLER, TRUSTEE.

WILLIAM W. WATTS,
Counsel for Arthur E. Mueller, Trustee.

JOHN RICHARD WATTS,
Of Counsel.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR ARTHUR E. MUELLER, TRUSTEE.

This cause originated under the bankrupt act of 1898 in certain proceedings before John B. Baskin, a referee in bankruptcy, for the District Court of the United States for the Kentucky District. An order of the referee, on petition for review, was reviewed by the judge of that court, who sustained the order of the referee. Thereupon, on petition for review, the Circuit Court of Appeals for the Sixth Circuit reversed the case; a petition for *certiorari* was then granted by this court for its consideration of the case.

Statement of the Case.

Edward B. Nugent, the bankrupt, had for many years been doing business at Louisville as a dry goods merchant. At the time of his failure he was the owner of a stock of dry goods and a house and lot of land in Louisville.

On February 9, 1900, he mortgaged his house and lot for $4,500.00, which after the payment of certain commissions and taxes netted him $4,133.45. This money he delivered to his son, the respondent, William T. Nugent, his confidential clerk, agent and bailee (R. 16).

On February 19, 1900, ten days later, he sold his stock of goods, all his then available assets, to one Hermann Straus for $12,000. This money was paid by check, which he in turn endorsed and delivered to his son, the respondent, as his agent. The check was immediately cashed, and, after the payment of some rent and commissions on the sale, there remained of that sum in the hands of the agent $10,100. The check was received by the bankrupt and delivered to the agent about the hour of 2 o'clock in the afternoon. He was then holding, as agent, the net sum of $14,233.45 (R. 16, 17, 18).

At 5 o'clock in the afternoon of February 19th, the day on which the check for $12,000 was received, and three hours after its receipt, certain creditors filed proceedings in involuntary bankruptcy in the District Court at Louisville (R. 13) against the bankrupt, Edward B. Nugent, and he was regularly adjudged and the case was regularly referred to the referee at the time of all the proceedings and all the matters complained of by the respondent (R. 37).

The petitioner, Arthur E. Mueller, was then elected trustee of the estate, and thereafter, at his instance, a rule was issued by the referee against the bankrupt to show cause why

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he should not deliver over to the trustee the fund of $14,-233.45, which was alleged to be in his possession or under his control. He appeared, and the depositions of himself, his daughters and numerous others were taken (R. 16), and thereupon, after a hearing, he was ordered to turn over the fund. On his failure to do so the referee certified the matter to the judge with recommendation that the bankrupt be punished for his contempt. Before the judge the bankrupt's counsel explicitly stated that their client was not of unsound mind. But afterwards there was a change of front, and a suggestion was made in writing that the bankrupt, eighty odd years of age, was of unsound mind. On a hearing the court reluctantly released the bankrupt because of his approaching senile imbecility, but with leave to the trustee to again bring the matter before the referee should developments make it in his judgment proper (R. 38).

On April 13, 1900, the trustee filed a petition before the referee, setting up certain facts alleging that the monies constituted a fund in the hands of William T. Nugent, the respondent, and said fund was a part of the estate; that respondent did not hold the same as a debtor. The petition prayed for an order enjoining and restraining him from disposing of the fund and directing him to turn over to the trustee all or such part of said fund as was in his (respondent's) hands (R. 13, 14, 15). The injunction was granted, and a show cause order was entered requiring the son to show cause in five days after service why he should not deliver over to the trustee the fund in question. (Referee's report, R. 15, 16.) On October 8, 1900, respondent was served with a copy of the order (R. 16), and on October 13 filed his response (R. 19), in which was contained three propositions, viz.:

1st. A denial of the jurisdiction of the court to make the show cause order.

2d. That at no time *since* the filing of the petition in bankruptcy had he received said fund or any part thereof.

3d. That he had been indicted by the Federal Grand Jury for that court, and was then being held for trial thereunder, and that his response in regard to said matters would tend to incriminate him thereunder.

The respondent made no test of the sufficiency of the petition by demurrer, objection or otherwise. He made no objection to the time given for response, but responded as stated. It was then stipulated that the depositions of the bankrupt and others theretofore taken should be read on the hearing of the sufficiency of the response (Referee's certificate, R. 17), and thereupon the matter was heard.

On the hearing the referee found the fact to be that the respondent held the fund as the agent or bailee—the mere custodian of the bankrupt; that it was the property of the bankrupt without adverse claim in respondent and became and still is the property of the petitioner as trustee; and adjudging the response insufficient, ordered respondent to turn over the fund to the trustee, on or before 9:30 A. M., October 17, 1900. (R. 15, 16, 17, 18.)

On respondent's failure to comply with the order at the time mentioned, the referee certified respondent to the judge, recommending that he be punished for his contempt, and that he be committed until he complied with the order. (R. 20, 21.)

At the same time respondent filed a petition for review by the judge (R. 21), whereupon the referee filed his certificate as required by form 56 and general order 27 prescribed by this court, in which he set forth the question presented, a summary of the evidence and his finding and order thereon. (R. 15, 16, 17, 18.)

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Respondent sought to review only the order requiring him to deliver the fund. He has not reviewed the order of April 13, 1900, granting the injunction, nor the show cause order granted that day. He reviewed only the order entered October 16, 1900 (R. 21), an important fact in view of the motions to expunge as hereinafter set forth.

The judge, after the hearing, *and having before him the depositions of the respondent's father, the bankrupt, respondent's sisters and others filed with the referee's certificate* (R. 16), rendered an opinion (R. 22), in which the finding of the referee was sustained. We quote from it the following forcible language, to-wit:

"The court finds the facts of the case to be as above stated, with the addition that the entire amount, $14,233.45, is the property of the bankrupt's estate alone; that it had been taken possession of and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication, and that the respondent never claimed title to any part of it, nor made any claim of right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has he ever claimed to have converted any part of it to his own use, nor in anywise to have claimed it adversely to the bankrupt or the trustee. (R. 25.)

. . . . . .

"Our conclusion is that upon the grounds indicated this case appears to call in the most vehement manner upon the court to exert all its powers to get this large sum of money out of the hands of this unfaithful bailee for the benefit of the bankrupt's creditors.

"Over $14,000, which manifestly belongs to the creditors and not in any sense to the respondent, have been received by the latter in the manner indicated, and is held by him under circumstances which present no appeal to the sympathies of any right-thinking man, and

if under the facts shown his retention of this fund may be allowed, and if such retention is sanctioned by the court, and if it be so easy by this species of jugglery between a bankrupt father and his son—if that be so easy of accomplishment—the rights of creditors in such cases may be defeated with an ease and completeness that would make involuntary proceedings in bankruptcy a somewhat laughable mockery. This characteristic will not be willingly impressed upon such proceedings by this court.

"Of the contention of respondent that he can not respond freely lest he criminate himself, it may be further remarked that there was the easiest possible way to avoid this by paying the money into court, and there making any claim to it that he had, so that the questions could be settled here. There has been no effort made either to pay the money or to state any fact to enable the court to decide whether the respondent has any sort of claim to it or any reason to present why he should not place it where the creditors who are entitled to it may get it.

"To sum up the whole matter: The respondent has the money in his hands as agent or bailee only. His possession is that of his principal. His principal was his father up to a certain stage of these proceedings, but whether up to the filing of the petition or up to the adjudication we need not stop to inquire, as it is immaterial in this case. At one or the other of those times his principal, by operation of law, was changed, and an officer of this court was substituted for his father. That change in no way lessened the duty of paying the money to the proper principal upon notice and demand. After the change, however, the money was potentially in the custody of the law in these proceedings and subject to the orders of the court. The rule and its service constituted sufficient notice and demand." (R. 28.)

After the delivery of the opinion, Nugent, being in court, was called to the bar to receive sentence; whereupon at the request of his counsel the judge deferred passing sentence for two days. At the expiration of

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said two days said respondent, by his counsel, tendered an amended response (R., p. 30), in which for the first time he sought to answer, in general terms, and with conclusions of law only, that the fund in question was held and claimed by him adversely to the bankrupt or his estate. The judge, on the theory that the hearing was in the nature of an appeal from the decision of the referee, refused to permit that response to be filed, holding that it manifestly came too late (R., p. 29); that such response should have been filed before the referee at the time of the hearing upon the rule. That amended response so offered was neither filed generally nor for the purposes of appeal or review. It bears no endorsement of its having been filed.

In refusing to permit said amended response to be filed, the court entered the following order:

> "Came William T. Nugent, respondent herein, and tendered an amended response and moved to file same, and the court not having postponed the imposing of the sentence for that purpose, and being of the opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed.
>
> "And thereupon, pursuant to the opinion of the court filed herein on the 1st instant, it is the judgment of the Court that William T. Nugent, for his contempt aforesaid, be imprisoned and confined in the county jail of Jefferson County, Kentucky, until he shall deliver or pay to Arthur E. Mueller, the trustee herein, said sum of $14,233.95, or otherwise satisfy the said trustee with respect thereto; and the court reserves the right and power to suspend or set aside the judgment and sentence upon the delivery, payment or satisfaction aforesaid.
>
> "To all of which the respondent, William T. Nugent, excepts." (R., p. 29.)

Thereafter said W. T. Nugent, under Section 24*b* of the act, filed a petition for review in the United States Circuit Court of Appeals, praying that the orders, judgment and sentence of the District Court be reviewed and revised in the matter of law, etc. (R., p. 1.)

Up to that time the case rested alone upon Nugent's response. And the gist of that response was that the court did not have jurisdiction to make him show cause. It was upon that state of case that the referee and the judge tried and determined the matter.

But on Nugent's review to the Circuit Court of Appeals, a widely different case was presented. He not only filed as an exhibit to his petition the amended response, which never was made part of the record, for the purpose of appeal or review, or by bill of exceptions, but in his petition for review he went outside the original response and outside that amended response, and incorporated therein matter wholly new and never before the court below. In fact, he presented to the appellate court a case which did not exist, which had not been tried.

His Honor, Judge Lurton of the appellate bench, was anxious to dispose of the case at an early day (R. 10). For that reason the motions to expunge (R. 8, 9, 10) the irrelevant matter were by stipulation (R. 10) made and argued at length at the hearing instead of preliminarily thereto, but no attention seems to have been paid to the motions to expunge, and the irrelevant matter still flourishes in the petition for review to that court.

The Court of Appeals heard the case and determined it on December 13, 1900, delivering a memorandum opinion (R. 41), whereon it issued its forthwith mandate in contravention of its rules, Nos. 29 and 32, set forth in our petition for *certiorari*, as follows:

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"29a. A petition for rehearing after judgment can be presented only within thirty days after the day when the printed opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines.

"32. In all cases finally determined in this court a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order of this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

"Such mandate shall not issue until time has elapsed for filing a petition to rehear, as defined by rule 29; and no mandate or other process or *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

"Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case."

By that mandate W. T. Nugent was immediately released from custody, and that before this petitioner could apply for a rehearing in that court or *certiorari* here.

On the 17th day of January, 1901, said Circuit Court of Appeals filed a printed opinion in the cause. (R. 43.)

On February 26, 1901, a petition for *certiorari* was filed in this court, and, being granted a week later, a motion to advance was sustained and the case set for October 28th for argument.

As required by rule 21 of this court, we, therefore, state as the errors relied upon, the following:

1st. The Court of Appeals erred in failing to sustain the motions to expunge.

2d. The Court of Appeals erred in holding that a plenary suit and not a summary process was the remedy in this case, under which the court below was reversed, its order set aside and respondent released from his commitment.

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The Motions to Expunge.

In the case of the Courier-Journal Job Printing Co. vs. Schaeffer–Meyer Brewing Co., 101 Fed. 699, involving the administration of a bankrupt's estate under the present bankrupt act, the Circuit Court of Appeals for the Sixth Circuit, in speaking of the practice on petitions for review to that court, used this language:

> "No rule or order has been made by the Supreme Court regulating the practice under the 24th section, and none has been prescribed by this court."

In that case a petition for review was filed. The respondent filed an answer, whereupon the petitioner filed a reply. Thereafter the respondent filed an amended answer, and the petioner filed an amended reply.

It seems to us that in that practice there is no occasion for any such pleadings; that some check ought to be placed on the pleader, for if not we may view the spectacle of rebutters and surrebutters, with proof to be taken not only on the new case thus made up, but upon the question of what were the issues below; and the case at bar furnishes a very good medium by which the pleading and practice may be regulated by decision of this court. For our contention is that the respondent in this case, by virtue of including in his petition for review important and material allegations not in the record below, has attempted to make a new case not justified by the record, either before the referee or the district judge.

The motions to expunge the irrelevant and impertinent matter were not idly made, but were made because of their supreme importance, as it seemed to us. *Based upon the relevant matter alone, the court certainly had jurisdiction of*

this case. Based upon the irrelevant matter, the court might possibly be ousted of its jurisdiction. And though elaborately argued, both orally and on brief, in the Court of Appeals, that court neither intimated that it ignored the irrelevant matter nor that it concerned itself about it, evidently deciding the case with that matter as a part of it.

On petition for review, in revision of matters of law, as provided by Section 24*b* of the act, the record below, as in all other cases, whether by appeal or otherwise, should be the record above; and impertinent, irrelevant or extraneous facts ought not to go into the record above; and it seems absurd that the allegations in the petition for review in matters of law were such that there had to be, subject to the motions to expunge, an answer in this case, or rather stipulations showing denials of the affirmative allegations of the petition for review, as is shown on page 10 of the record. Such practice we submit is unheard of.

Under the act of '67 the office of register was vastly different from that of referee under the present act. By Sec. 5009 of the former act it was provided that the register should, in the event of a contest between parties to the proceedings, deliver to the judge the two sides of the case in writing, as stated by the parties, whereupon the judge should decide the contest. The language of the statute is as follows:

> "Sec. 5009. In all matters where an issue of fact or of law is raised and contested by any party to the proceedings before any register, he shall cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge."

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It is therefore seen that the register had few, if any, of the powers of the judge; that he was limited to the office of clerk, merely performing those matters of course arising in the administration of the estate.

The act of '98, however, creating the office of referee, makes that officer, upon a general order of reference, an assistant to the judge; makes him the court for all purposes except such as are limited to the judge alone.

> "Court shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee." Sec. 1 (7).

Among the powers of the court fixed by Section 2 are:

> "(6) Bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy. (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided. (13) Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment, or fine and imprisonment. (15) Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. (16) Punish persons for contempts committed before referees."

Under the heading of "Jurisdiction of Referees" the act provides that the referee is invested with jurisdiction to—

> "perform such part of the duties except as to questions arising out of the application of bankrupts for compositions or discharges as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts except as herein otherwise provided." Sec. 38*a* (4).

And this court, in construing the act, through its general order 12, entitled "Duties of the Referee," provides for a general reference in these words:

> "And thereafter all the proceedings except such as are required by the act or by these general orders to be had before the judge shall be had before the referee."

On an adjudication and reference to the referee he has jurisdiction of all the powers conferred upon the courts of bankruptcy under Sec. 2, excepting such as may be specially confined to the judge alone.

And as gathered from the act and general orders, those powers which can not be exercised by him are:

(1) A granting or refusing a discharge; (2) the confirmation or rejection of a composition; (3) enjoining proceedings of a court, United States or State officer; (4) commit for contempt; (5) order the seizure of property by a receiver or marshal prior to adjudication.

Sec. 38*a* (3) applies only to the seizure of property by the marshal or a receiver, as provided by Section 2 and by Section 3*e* and Section 69, when upon proper showing and proper bond *before the adjudication*, the judge, or in his absence, the referee, on a hearing, will order the seizure of the bankrupt's property. And even if the steps taken in this case could be construed to be a taking of possession or releasing the property as set forth in that Section 38, the section could not cover this case, because at the time of the order *it had already been referred to the referee under a general reference.*

So that *after a reference* to him, a referee, as the court, under Section 2 of the act, may bring in parties; may grant injunctions against other than courts or officers; may appoint receivers; may make all necessary orders, and has all the

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powers of the court except those specially reserved to the judge. He then is the court, made so by the act itself and this court in construing it; and in the case of White vs. Schloerb, 178 U. S. 542, it was said:

> "Under Sec. 33–43 of the Bankrupt Act of 1898, and the Twelfth General Order in Bankruptcy, referees in bankruptcy are appointed by the Courts of Bankruptcy and take the same oath of office as Judges of the United States Courts. Each case in bankruptcy is referred by the Court of Bankruptcy to a referee, and he exercises much of the judicial authority of that Court."

In the case of Pirie vs. Chicago Title & Trust Co., decided May 27th last, this court affirmed the order of a referee adjudging that Pirie's claim be reconsidered and rejected, and that a dividend paid thereon should be returned.

It may then be said that the referee's office is "a first court in bankruptcy." The orders of the referee may be reviewed by the judge. This court further construing the act has made general order 27, which provides for a petition for review to the judge, and has established form 56, under which, when such review is desired, the referee shall certify to the judge the question which was presented, a summary of the evidence and his findings and order thereon.

The review is in the nature of an appeal and the referee's certificate the record on which the case is reviewed. Complaint may be made to the referee or to the judge if the certificate is not complete or is insufficient, or a part of the original record is desired on review to the judge; but without that complaint the certificate, with the proceedings in the upper court, based thereon, make up the case, whether it stops at the judge or goes on through to the Circuit Court of

Appeals and the Supreme Court of the United States, as has this case.

Something was meant by the Congress and this court in the establishment of all that machinery for the relief of the judges; for the quick and speedy obtention of finality in litigation at small cost. Immense volumes, making up the bankrupt's books of account, are examined in the referee's office. Hundreds and even thousands of pages of testimony are there taken; and it is evident that it was intended that the record on review for the convenience of the judge and the upper courts, for economy to the litigants, should be made up under form 56, and that certificate should then control the upper courts in their decision.

Cunningham vs. German Insurance Bank (C. C. A)., 103 Fed. 932.

Courier-Journal J. P. Co. vs. Schaeffer-Meyer Brewing Co. (C. C. A.), 101 Fed. 699.

The motions to expunge will be found on pages 8, 9 and 10 of the record, and we take up the objectionable parts *seriatim*.

First: "On February 17, 1900." (R. p. 1, sixth line from the bottom.)

There is no such date in either the report of the referee or the opinion of the district judge. It should have no place in the petition for review.

Second: "Upon the 13th day of April, 1900." (R. p. 2, fourth paragraph, eleventh line thereof.)

Nugent was not brought before the referee on the 13th day of April, 1900, but was brought before the referee in October, 1900; the date mentioned is not shown in either the certificate of the referee or the opinion of the district judge, and should have no place in the petition for review.

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Third: "And that he was thereupon over his objection and that of his counsel required to be sworn and examined in regard to said matter; but—" (R. p. 3, third paragraph, first, second and third lines thereof.)

Nugent filed with his petition for review his deposition, which was taken before the referee. It will be found as exhibit No. 12 on page 33 of the record.

That deposition was no part of the proceedings against W. T. Nugent, and as per stipulation page 37 of the record that deposition was taken in pursuance of Section 21 of the act of 1898, for the general purposes of the estate only, and that deposition had never been certified to the judge of the District Court, and same was never before him under the certificate of the referee. The motion to expunge includes that deposition, and it should have no place in the petition for review, and his allegation that he offered his objection, was sworn and examined in regard to the matter, is untrue, so shown by the record, and should also have no place in the petition for review.

Fourth: "He says that he was so advised by his attorneys and believed that his response in reference to these matters would tend to incriminate him under said indictment." (R. p. 5, second paragraph, 8th, 9th, and 10th lines.)

Fifth: "That he was at the time arrested and in jail, under said indictment, from whence he was brought in custody of an officer to make said response, and still so remains in jail." (This allegation immediately follows the lines last above quoted.)

Sixth: "That but for these reasons he could and would have responded fully, and could and would have shown that he was not in contempt of the court, and that when the referee held his response as a whole insufficient he would

have filed an amended response, but for the fact that the referee stated and so held that he could not be examined or required to answer as to such matters as would tend to criminate him under said indictment." (These lines immediately follow those last above quoted.)

These allegations ought to be eliminated, as they should have no place in the petition for review. The Debs case, 158 U. S. 564, disposes of the indictment in the following language:

> "A court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws, nor invading the constitutional right of trial by jury. . . .
>
> "The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. . . .
>
> "And it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction."

The next objectionable allegation is found in the record, page 5, immediately following the matter in 4, 5, and 6, as above shown. It reads as follows:

Seventh: "He says that he had no notice of the filing of the petition or the application for the injunction herein thereon, and that the same is irregular and void, and said referee had no right to grant or issue said injunction or rule thereon."

The order granting the injunction was entered April 13th, *and was never reviewed or appealed from and is not before this court*, and any reference to the injunction is irrelevant. As to notice of the filing of the petition for rule, the rule to show cause itself gave notice upon service, and no objection was ever made before the referee or the judge based on want of notice. This matter ought to be eliminated.

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Eighth: "And it is shown that he held same adversely to the said E. B. Nugent and as transferee before the filing of said petition." (R. p. 5, second paragraph, 28th, 29th, and 30th lines.)

This averment is untrue and is not shown in either the certificate of the referee or the opinion of the district judge.

As shown in the referee's certificate (R. 16), Nugent agreed by stipulation that various depositions then taken should be read on the hearing of the response to the rule; and the finding of the facts by the referee and district judge below are conclusive on the review in matters of law under Sec. 24*b*, and the referee and the judge found that Nugent had the fund and did not hold it adversely. This allegation, therefore, ought to be stricken out.

Ninth: "He says that he had converted all of said money of E. B. Nugent which came into his hands to his own use, he being a creditor of said Nugent, and to the paying of the other debts of E. B. Nugent before the filing of said petition in bankruptcy or the appointment of said trustee or the adjudication herein, and that there was no evidence to the contrary or that he had any of said money on hand or under his control when he was served herein as stated." (R. p. 5. These lines immediately follow those last above quoted.)

This matter was never before either the referee or the judge, nor was it included in the amended response which was attempted to be filed, and it is original matter with the petition for review and the first notice of any such contention given to the trustee, as is shown on a reading of the record. Clearly an appellant or petitioner for review can not change the issues in the case in the appellate court. This matter has no place in the petition for review and should be stricken out.

Tenth: "He, as advised, states and charges that the contempt for which he is proceeded against and held herein in a

civil contempt, a failure to pay money which he is ordered by the court to pay, for the benefit of others, and that, as also shown by the proceedings herein, his failure to answer fully in said matter is due entirely to the fact that he stood indicted, and was not required to answer, and the further fact, as he was advised, that the court had no jurisdiction, and that upon the determination by the court that it had jurisdiction, this petitioner offered said amended response; under which, had he been permitted to file same, he could and would have shown as therein stated." (R., p. 5. These lines immediately follow those last above stated.)

This allegation is disposed of by the Debs case and has no place in the petition for review. Further, the amended response was not offered before the referee, but only before the judge after the decision and opinion.

The motion to expunge also includes the striking out of exhibit No. 2, filed with the petition for review, to wit: "An order and release of E. B. Nugent."

This order and release is not on review, and it has no place with the petition therefor.

The motion to strike out includes exhibit No. 12, "The Deposition of William T. Nugent." It has been explained that as shown by the stipulation (R., p. 37) that deposition was taken in pursuance of Section 21 of the act for general purposes of the estate only, and that same has never been before the referee or the district judge in this matter. It clearly has no place in the record.

The motion to expunge also includes exhibit No. 11 filed with the petition for review, to wit: the "Amended Response and Copy of Indictment." That amended response was never offered to be filed before the referee, but being satisfied with his position, Nugent had the case as it then stood reviewed by the judge. The judge after hearing the

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case brought in his opinion (R., p. 22), and two days thereafter the amended response made largely to conform to the opinion of the court was offered. The judge, holding the case to be before him on review in the nature of an appeal, entered an order, part of which we wish to quote at this stage, to wit:

> "Came William T. Nugent, respondent herein, and tendered an amended response, and moved to file same, and the court not having postponed the imposing of the sentence for that purpose, and being of opinion that it is not discreet or admissible practice to permit amendments upon hearings such as this, especially after the delivery of an opinion of the court, declines at this stage of the proceedings to permit a further response to be filed."

Insisting that the judge was right in refusing to file the paper because the case was before him in the nature of an appeal, it, at least, was within his judicial discretion to refuse to receive it when the case had been heard and determined, and a written opinion delivered by him. The exercise of such discretion at that stage of the case will not be disturbed on appeal or review.

Neale vs. Neale, 9th Wallace, 1.

Since the salient feature of that paper (R., p. 38) is this: "He says that whatever money came to his hands on February 19, 1900, belonging to said E. B. Nugent, or any such money at any subsequent date thereafter, was not received or held by this respondent as agent or bailee or in any trust capacity whatever, but was held adversely to said E. B. Nugent," we contend that it was but a sham, a subterfuge, built to avoid the effect of the decision of the court rendered two days before; and that even if the filing of an amended response was allowable before the judge, at that stage of the

proceedings, such a conclusion of law as was alleged, all the circumstances of the case considered, would not be accepted. Facts on which to base intelligent action should be stated.

> "A plea that at the time of the bringing of this suit and long prior thereto this defendant was and still is in the open, notorious, continuous and exclusive possession of the said premises, as the sole owner thereof, and claiming and holding adversely to the complainants and the whole world, is bad in that it consists of conclusions of law." McCloskey vs. Barr., 38 Fed. 165.

On the motion, out of time, to file a pleading against objection, the court may look to the sufficiency of the pleading in its determination of the motion to file.

After the failure to amend the response before the referee, it was proper for the judge to refuse to allow the amendment to be filed, when Nugent had stood by his response, waited till after the hearing on review, and, after the case was decided by the judge, then offered, with conclusions of law only, a demurrable amendment, which in general terms tried to avoid the effect of the opinion of the judge, rendered two days before, in deciding the case.

It is not proper practice that a party shall wait to see what the court will decide, on review or otherwise, before he puts in his defense.

The Court of Appeals is not a court of original jurisdiction, and issues are not to be joined there, or proof taken there on such issues.

Stripping the record of the irrelevant matter, as we hope the court will do, the case stands on the certificate of the referee to be revised in the matter of law. The facts as found by him and the judge are, that Nugent, the son, the agent or

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bailee, the custodian of the bankrupt, received the great bulk of this money within three hours of the time of the filing the petition in involuntary bankruptcy.

While the trustee's title might not go beyond the date of the adjudication, the filing of that petition was a *caveat* to all the world as well as to the respondent.

Bank vs. Sherman, 101 U. S. 406.

Any claim of title or adverse possession to be made by respondent must have arisen at the delivery of the fund at two o'clock in the afternoon, or certainly between that time and five o'clock in the afternoon, the time of filing the petition—a period of three hours in all. It was agreed by Nugent, as shown by the referee's certificate, that the depositions of Edward B. Nugent, respondent's father, the bankrupt, the Misses Nugent, his sisters, and numerous others should be read on the hearing of the response. On the hearing the referee found the fact to be that respondent as agent or bailee of the bankrupt, as a mere custodian, had received the fund; and that, without title or color of title in himself or adverse claim thereto; that the fund was the property of the bankrupt; that it belonged to the bankrupt's trustee. Any reference, therefore, to extraneous matters ought, on motion, to be stricken out.

Plenary Suit or Summary Process—Which?

In our petition for *certiorari* and argument filed February 26, 1901, we asked these questions:

> "Does the Bardes case or White vs. Schloerb apply?"
>
> "Both cases were decided on the 28th day of May, 1900, and are reported in 178 U. S., pp. 524 and 542, respectively. The one deals with him who holds assets of the estate in adverse possession coming to his hands before the bankruptcy proceedings. The other deals with him who seizes the assets after the bankruptcy proceedings had begun and when the property had come in *custodia legis*. This Nugent case is intermediary, and deals with one coming in possession three hours before the institution of bankruptcy proceedings, yet who holds the assets as agent only without adverse claim. Which of the cases decided by this court applies—Bardes vs. Bank or White vs. Schloerb? Or does it devolve on this court now to formulate other principles applying to and covering the case at bar?"

This court has answered those questions in the decision of Bryan vs. Bernheimer delivered on April 15th last.

It is perfectly plain that the Bardes case deals with a *suit of the trustee* against a third party to recover from him *property fraudulently transferred* to him by the bankrupt *before the filing of the petition in bankruptcy*, and which that third party *claims as his own.*

It is equally plain that White vs. Schloerb deals with *a rule against one taking property away from the court's possession.*

It is just as clear, we think, that the Bernheimer case deals with one, *whose agency to the bankrupt being established,*

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will be summarily ordered by the court to turn over property coming to his possession, before the filing of the petition, *without beneficial claim in him.* The opinion opens with the statement:

> "The general assignment made by Abraham to Davidson did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors."

True, there was a receiver's application for the property before election of a trustee; true, Bernheimer answered consenting to the jurisdiction; and true, Bernheimer had purchased with notice of the bankruptcy proceedings; strong concomitant parts of that decision, yet we believe not necessary to sustain the principles of the case, since the agency under the deed of assignment was established. The truth of that proposition may be easily tested. Take the assignment or establishment of the agency from the case and the case falls to the ground. Leave it there and take away the other concomitants and the decision will remain.

And how does the agency under that deed of assignment differ from the bankrupt's statement that he had turned over the money to his son as his agent? Not at all. It may be said that the assignee's acceptance of the trust estopped him from denying it. That may be true; and Nugent's silence on the subject when called upon to respond to the rule avails him nothing and but assists in establishing his agency.

In contra-distinguishing the Bernheimer case from that of Bardes, the court said:

> "The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself."

Just so with the case at bar, for we are dealing with an agent without claim of adverse interest in himself—with an "other person" within the meaning of Section 2 (13) of the act, when the court may "enforce obedience by bankrupts and other persons to all lawful orders, by fine or imprisonment." And where by Section 2 (7) it will "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto." The court will deal with this agent just as it did with Davidson, the agent in the Bernheimer case. The last paragraph of that opinion directs that Davidson be brought into the case under Section 2 (6), in order that full justice might be done Bernheimer concerning the money in Davidson's hands —the proceeds of his principal's property.

The Court of Appeals was probably misled in its understanding of the Bardes opinion. It understood that it mattered not what was the possession, a plenary suit only could be maintained. Its language (R. 47) speaking to the Bardes case follows:

> "But such language was meant, as we understand from its context, to include all holdings as adverse when the circumstances are such that the property cannot be recovered without resort to legal remedies. For the reasons given for the decision would apparently include all such cases. In the case of a general assignment for the benefit of creditors, the assignment being void, the assignee's possession is without right, and the title as well as the right to possession is in the assignee (trustee). But if the latter cannot recover the property otherwise than by legal proceedings, he must resort to the ordinary legal remedies. We perceive no valid distinction between such a case and any other where there is an adverse holding in fact by one not a party to the proceedings, no matter what the character of such possession may be in point of law."

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That opinion was delivered *before* the promulgation of the one in the Bernheimer case.

The Court of Appeals (R. 46) says:

> "But it is the exercise of jurisdiction to determine whether the circumstances are such that the possession is really in right of the bankrupt, or adverse to him or to the trustee."

It is not the "exercise of jurisdiction" simply to consider the preliminary question *in limine* as to whether there be jurisdiction. The first thing the court must determine is the question whether it has jurisdiction. This is a mere preliminary inquiry. It is not taking jurisdiction of the action nor inquiring into the merits of the action. In the case at bar it was necessary for the referee, before whom the petition for a rule was filed, to inquire into that preliminary question, and in doing so he was compelled to ascertain whether the respondent was claiming the property adversely or whether he held it as a mere custodian. Upon the settlement of that question depended the jurisdiction.

This proposition is easily tested. Say, for instance, that to a bill in equity the defendant pleads to the jurisdiction, denying diverse citizenship. Would a mere denial or statement that the citizenship was not diverse alone stop the case? Not at all. But the court would be forced to its inquiry of whether it had jurisdiction. How? By proof, as in the case at bar.

But we submit that the case at bar must not be tried by the test laid down in the above quotation from the Court of Appeals, for, because of respondent's failure to assert adverse possession, the referee was not called on "to determine whether the circumstances are such that the possession is

really in right of the bankrupt or adverse to him or to the trustee."

That question, for this court, was eliminated in two ways:

First: The respondent asserted no right or title to the property before the referee.

Second: The circumstances under which he held possession were conclusively found by the referee, and by the judge, with respondent failing to assert ownership or adverse claim; and the question of fact is not a question to be considered by the Court of Appeals on petition for review, as it would be had appeal been allowed and taken under Section 25 of the act. Only questions of law can be considered on review under Section 24*b*, and the act has been so construed by the Court of Appeals for the Sixth Circuit in the case of Cunningham vs. German Insurance Bank, 103 Fed. 932, and Courier-Journal Job Printing Co. vs. Schaeffer-Meyer Brewing Company, 101 Fed. 699.

The opinion of the Court of Appeals further says:

> "Let it be conceded that in the eye of the law the possession of the agent is that of the principal," etc.

As we conceive it, this admission is inconsistent with the conclusion of the court; for if W. T. Nugent was holding this property as the agent of the bankrupt, and if the bankrupt's estate is placed in *custodia legis* by the adjudication in bankruptcy, the agent must hold as trustee of the court and its officer; and it follows that the court certainly has the power to compel its agents or trustees to return to it or to its trustee in bankruptcy all property thus held. Moreover, it seems to us that that ruling would logically require the trustee to go into an inde-

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pendent suit to recover property in the pocket of the bankrupt himself (the contrary being held *in re* Purvine, 96 Fed. 192) if it requires him to adopt such a proceeding to recover possession from the bankrupt's custodian, for the possession of the agent is the possession of the principal.

If a suit were brought against the assignee under a general assignment, where bankruptcy had followed by reason of such assignment, the assignee, in his answer, would not be heard to dispute the title of the trustee in bankruptcy, because his title is already determined by the adjudication itself. He could only plead that he has possession under the assignment, and upon the filing of such a plea judgment by confession would follow. To require suit to be brought under these circumstances strikes us as making it necessary for the court to submit to being trifled with, with possibly years of delay on appeal. Of course if the custodian, in good faith, was asserting any claim or colorable claim to the property, a rule against him to deliver possession would have to be discharged at once, under the principles of the Bardes case; but in order to ascertain whether he was making such a claim a rule to show cause ought to be eminently proper.

A court in bankruptcy, upon adjudication, coming into control of the *res*, surely has the power to inquire by rule, of one alleged to be an agent, why he shall not deliver over to the trustee in bankruptcy the property in the hands of such agent. The court has the right to make its diagnosis, to have a proper statement of fact in response, showing whether such adverse holding exists; and if it exists, on such showing it must, under the Bardes case, discharge the rule. Otherwise, if such claim or facts are not made or shown.

Such a proceeding does not involve the title of the respondent, but merely shows to the court, as it is entitled to know, whether an adverse claim exists; whether the property is assets of the estate; or whether there must be a

separate and independent suit to determine that proposition. The rule is only what the respondent chooses to make it. If he shows adverse claim, color of title, title or ownership, there is nothing to do but let him go; and then the trustee may bring a plenary suit. But if the respondent shows nothing, except that he questions the jurisdiction of the court to issue the rule, that jurisdiction is complete, and the order to turn over ought to go.

Such a construction of the law as the Court of Appeals has given would lead to many useless suits, incurring thousands of dollars of expense without accomplishing any good results, and would entail great and unnecessary delay in the gathering in of the bankrupt's estate; all when equity moves directly and avoids a multiplicity of suits.

The evils of such a rule are clearly stated by Judge Jackson, of the West Virginia District, in the case of *in re* Moore, 104 Fed. 869, and the facts and reasoning are so in consonance with our ideas of the case at bar; the opinion being short, we take the liberty of quoting it in full:

> "The certificate of the referee, and the report of the trustee of the above bankrupt, which have been certified to the District Judge, show that the bankrupt, just prior to the filing of the petition herein, turned over to his wife certain moneys and properties amounting to $300 in value, which properties she now refuses to turn over to the trustee, although admitting the receipt. The wife of said bankrupt has made no claim of ownership of said property, but simply claims, according to the record now before me, that she is advised by her counsel not to deliver possession thereof to said trustee unless ordered by court. While title to property or moneys claimed by the trustee to belong to the bankrupt are not ordinarily to be tried by the District Court, and the claims of ownership of adverse claimants summarily be passed upon and determined by this court, yet the ownership not being contested, the trustee should not be driven to his action

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to obtain possession of property of the bankrupt, simply because such property is in the possession or custody of another not claiming ownership thereof. Were this the case, the trustee might be compelled to institute suit for every separate item of the bankrupt's estate not in the personal, physical possession of the bankrupt at the date of the adjudication; and the malice, caprice or whim of the bankrupt, or the various parties who chanced to have physical control of portions of the bankrupt's estate at that date, could on any pretext, or without pretext, nullify the entire purpose of the act. Fortunately, the bankruptcy act is not subject to such an absurdity. As soon as the trustee is appointed and qualified he is vested with the title to the bankrupt's property. The vesting of the title gives him constructive possession of the property the instant the title passes. Such property is thereby brought into the bankruptcy court and placed in its custody and under its protection as fully as if in the visible presence of the court. Being in the custody of the bankruptcy court, to interfere with or withhold it is contempt of such court, and may be punishable as such. Section 21*e* provides that a certified copy of the order approving the bond of the trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and is sufficient to authorize and require all custodians of such property, wherever situated, to deliver it to such trustee. Section 70, Subd. 5, provides that the trustee shall be vested by operation of law with the title of the bankrupt to 'all property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him.' Upon the facts of this case an order should be entered requiring Mrs. Moore to forthwith turn over to the trustee all property of the bankrupt of every description in her possession, and a failure to comply therewith would, upon proper proceedings had thereon, constitute a contempt of this court."

In the case of *in re* Green, 108 Fed. 616, Judge McPherson released the wives of the bankrupts, but it was

because the money held by them had been paid them by the bankrupts in satisfaction of debts alleged to be owing them, and they therefore held it as a matter of right, and adversely. No such state of facts exists here.

The Circuit Court of Appeals for the Ninth Circuit, *in re* Francis-Valentine Co., 94 Fed. 793, has decided that the court may summarily require a sheriff to deliver to the trustee the possession of a bankrupt's property seized within four months prior to the proceedings in bankruptcy; and in that case the court, commenting on Marshall vs. Knox, 16 Wall. 551, used this language:

> "In that case a lessor of the bankrupt had caused the sheriff, under a writ of provisional seizure, to take possession of certain property of the bankrupt, which the lessor claimed the right to hold as a pledge for the payment of rent which was due him. It was held that the District Court sitting in bankruptcy had no jurisdiction to proceed by rule to take the goods from the possession of the sheriff. The court, referring to the seizure of the goods, said: 'The landlord claimed the right thus to hold possession of them until his rent was satisfied. This claim was adverse to that of the assignee.' These words quoted from the opinion fully explain the ground of the decision. It was because the claim was adverse to that of the assignee. In the present case the sheriff had possession, not in opposition to the right of the bankrupt nor in antagonism to its title, but his possession was based entirely upon the assumption that the title was in the bankrupt."

The court will observe that the analogy between the Valentine case and the case at bar is complete, for it is established by facts binding upon the Court of Appeals that W. T. Nugent received this money as custodian only; that the capacity of custodian was never changed, and that he was asserting no adverse claim or title thereto; but, in the

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words of the Court of Appeals for the Ninth Circuit, Nugent "had possession, not in opposition to the right of the bankrupt, nor in opposition to his title, but his possession was based entirely upon the assumption that the title was in the bankrupt."

The practice under the present law of taking the assets from the custodian by rule has also been followed, *in re* Brooks, 91 Fed. 508; Judge Wheeler, by a rule, compelled a purchaser, under purchase made after the filing of the petition in bankruptcy, to turn over the property to the trustee, even though the sheriff, who made the sale, had already levied upon the property prior to the proceedings in bankruptcy. See also *in re* Stokes, 106 Fed. 312.

Again, it was decided *in re* Rosser, 101 Fed. 562, by the Circuit Court of Appeals for the Eighth Circuit, that—

> "The effect of an adjudication in bankruptcy is to place all the property of the bankrupt, not exempt by law, in the custody of the District Court, and to charge the bankrupt and all other persons who have the possession or control of any of it, as trustees for the court and for the trustee in bankruptcy who is subsequently appointed."

The learned counsel for respondent strenuously contended in the argument below and on the petition for *certiorari* that this case fell within the principles of the Bardes decision. It was his idea that the delivery of possession to the respondent constituted at best only a fraudulent transfer to a third person claiming the property as his own.

That, however, was also *before* the delivery of the opinion in the Bernheimer case.

There never was at any time any claim to adverse interest or a transfer within the meaning of the statute or the Bardes

case until after the finding and order of the district judge on review. It was at that time that the attempt was made to oust the court of its jurisdiction by offering the amended response, the filing of which the judge refused to order.

And, based on that irrelevant matter, the burden of the response and counsel's argument is that the referee had no right to go to the length he did; that he and the court were without jurisdiction; that the trustee must be relegated to a plenary suit in the State court, with the slow and uncertain processes therein; that this summary method was unauthorized by the law. We may reach the contention in a way other than through the decisions based on the present law.

This court in White vs. Ewing, 159 U. S. 36, said:

> "In this case, however, the court proceeds upon its own authority to collect the assets of an estate, with the administration of which it is charged; and if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation over which it has by an original bill obtained jurisdiction. In this particular the jurisdiction of the circuit court does not materially differ from that of the district court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted." Ryan vs. Kingsbury, 88 Ga. 361.

One of the reasons for that similarity is that the receiver of a court and the trustee in bankruptcy are in exactly similar positions. True, the one takes his power from the order, the other from the statute; yet both are officers—arms of the court. (Secs. 2 (18) and 33.) And the administration of the estates in the hands of the two officers are in all respects identical—that is, under the law. Except with respect to receiverships for special purposes, both take all the property

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of the debtor; and the remedies for one are the remedies for the other. If then the law allows to receivers summary process against third persons with respect to the debtor's property, it also allows the same process to trustees in bankruptcy.

And the law does allow this fiduciary the summary process invoked in this case.

> "The receiver being the officer or agent of the court is entitled to its assistance in obtaining possession of property which is the subject-matter of his receivership and may have an order of court to procure possession of such property not only against defendant in the action but in a proper case against his agents and employes, although not parties to the record requiring them to deliver up the specific property.
>
> "Such procedure does not conflict with the principle that no man shall be deprived of his property without due process of law, since the surrender to the receiver does not affect the ultimate question of the right to the property any more than does the levy of an attachment; the purpose being merely to secure the property by getting it into the receiver's possession, so that it may be safely delivered to the party who shall be finally determined to be entitled thereto.
>
> "And the order for the surrender of the property to the receiver may, if necessary, be enforced by process of attachment."

High on Receivers, 3d Ed., Sec. 144, citing *in re* Cohen, 5 Cal. 494. Geisse vs. Beall, 5 Wis. 224. Green vs. Green 2 Sim. 430. Miller vs. Jones, 39 Ill. 54.

Smith on Receiverships, pp. 64 and 122, citing *re* Cohen, 5 Cal. 494. Ryan vs. Kingsbury, 88 Ga. 361. Geisse vs. Beall, 5 Wis. 224. American Const. Co. vs. Jacksonville T. & K. W. R. Co., 52 Fed. 937. Green vs. Green, 2 Sim. 430. Miller vs. Jones, 39 Ill. 54. Brandt vs. Allen, 76 Iowa, 50.

Griffiths vs. Griffiths, 2 Ves. Jr. 400. People vs. Rogers, 2 Paige, 103.

"The court will, moreover, oblige the attorney of a defendant to render an account and inventory, under oath, of all trust funds belonging to the defendant which may have come into his hands, and to deliver them over to its receiver. The same rule applies to agents and employes of the defendant, even though they are not parties to the record. The surrender of the property to a receiver under order of the court is enforceable by attachment process." Beach on Receivers. (Alderson's Ed.) Sec. 244 citing same cases. See Ryan vs. Kingsbury, 88 Ga. 361.

"Courts of equity unquestionably have the power to appoint receivers and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agent, and in proper cases they can also order the defendant's agents or employes, although not parties to the record, to deliver the specific property to the receiver.

"This power does not conflict with the provisions of the law which provides that no man shall be deprived of his property without due process of law." *In re* Cohen, &c., 5 Cal. 494.

"The practice of requiring the surrender of property to the receiver by summary motion or petition is well recognized where it is held by the attorneys, agents and employes of the defendant. Beach, Rec. 230. The same practice seems not improper where the property in question is held by a defendant in the motion, not for himself but as trustee, and so, in a sense, as the agent for those interested in the assets, including the defendant in the case. In modern litigation in equity a defendant's property may be in the possession of hundreds of agents and bailees, holding under various agreements, and it is not reasonable that a receiver appointed of all the assets should be required to sue each bailee and agent separately or that all should

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be made parties to the main suit should they merely refuse to surrender the assets."

"This summary proceeding is not opposed to the constitutional provision that no one shall be deprived of his property without due course of law, because the receiver does not become vested with any beneficial title to the property."

Miles vs. New South B. & L. Ass'n., 95 Fed. 919.

Brandt vs. Allen, 40 N. W. 82.

Beach Receivers, 209.

Bibber White Co. vs. White River Valley Electric Co., 107 Fed. 177, citing *ex parte* Tyler, 149 U. S. 164.

The Court of Appeals at the close of its opinion (R. 48) says:

> "Our conclusion that these proceedings are invalid for lack of sufficient authority from the law also makes it unnecessary to consider whether, if such authority existed, the petition to the referee for the order to show cause was sufficient to found the proceedings against the respondent, and whether the proceedings taken thereon were regular or otherwise."

It is true that that petition is not as specific as it might now be made; but when the respondent came to read it, he saw that the trustee was seeking the fund realized from the sale of the stock, and that the prayer of the petition not only sought an injunction against him, restraining him from disposing of the fund, but sought an order directing him to deliver it to the trustee.

As to the sufficiency of the petition, he was satisfied, for he filed no demurrer to test it. If the court had jurisdiction to entertain a petition at all, then it was the duty of respondent to test its sufficiency in a proper way before the rule was

made absolute and the entry of the subsequent orders by the referee.

The fact was that the trustee did not know whether the father or the son had the money, and the desire of the trustee was to get it; the effect of the allegation was that respondent had it; the true facts were within his knowledge; the prayer was directed against him, and if he did not have it he could easily have said so; and we submit, since, as was said in White vs. Schloerb, the question concerns not the trial of the title to these goods, but only the judicial custody and lawful possession of them; since, as was said in White vs. Ewing, the trustee is a party merely because he represents the court in its inherent power to wind up the estate of an insolvent over which it has by an original bill obtained jurisdiction, a mere petition, or perhaps a mere affidavit and motion without the formalities of a bill, would be sufficient to establish a basis for rule. The court, as the record discloses, had already tried to obtain the fund from the bankrupt (see petition R. 13 and Judge Evans' opinion R. 38); it was in reality familiar with the facts, and we question very much whether the court of its own motion, after hearing the proof, and knowing the facts as it did on the effort against the bankrupt, might not have entered the show cause order against the son and agent without further ado. We therefore feel constrained to say that, had the Court of Appeals deemed it necessary to consider the petition, it would have held it sufficient, the more especially since the court was familiar with the facts and respondent did not complain.

Under Section 70 of the Bankrupt Act the property of the bankrupt, including his *money*, passes to the trustee in

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bankruptcy. This includes all money and property in his hands as well as all money and property in the hands of his agents, bailees or trustees, for the possession of the agent, bailee or trustee is the possession of the principal. It may be said that these fiduciaries may have some claim against the property, and if true, those claims probably ought to be settled before the property is taken from their possession. But when called upon they must assert and set up those claims.

Speaking to the power of the court in bankruptcy to order the bankrupt and all other persons to deliver over the money or property of the bankrupt, the Eighth Circuit Court of Appeals, in an opinion by Judge Sanborn *in re* Rosser, 101 Fed. 562, said :

> "Two essential facts limit this power and condition its lawful exercise. They are that the money or property directed to be delivered to the trustee or other officer of the court is a part of the bankrupt estate, and that the bankrupt or person ordered to deliver it has it in his possession or under his control at the time that the order of delivery is made."

And in the last paragraph of the Bernheimer case this court directed that the lower court bring Davidson, the trustee, the agent, into the case under Sec. 2 (6) of the act, so that full justice could be done Bernheimer concerning the *money* held by Davidson.

See also Pirie vs. Chicago Title & Trust Co. decided by this court May 27, 1901, as to transfers of money.

In the very interesting case of Wasson vs. Hawkins, 59 Fed. 233, supported by various authorities of this and other courts, a demurrer to a bill seeking the recovery of money deposited with a failing bank within a few hours of its

failure was overruled. The analogy between that case and this one is striking. The deposit there was with a bank, here with an individual; both, however, were mere custodians, and both holding the money coming into its possession only a few hours before the failure. Judge Baker in his opinion in that case said:

> "The true distinction, therefore, between money, banknotes, or negotiable bills, and other chattels, would seem to be that the former, for the protection of commerce, can not be followed into the hands of a *bona fide* holder to whom they have passed in due course of business, while other chattels affected by a trust may, in general, be pursued and reclaimed. The ancient notion that money could not be followed, even as between trustee and *cestui que* trust, because money had no earmark, has given way to a more just and enlightened doctrine. Money, banknotes, and negotiable bills may be followed by the rightful owner, where they have not been circulated or negotiated, or if the person to whom they have passed has express notice of the trust. Miller vs. Race, 1 Burrows, 452; 1 Smith, Lead. Cas. (5th Amer. Ed.) 597 (250); Taylor vs. Plumer, 3 Maule & S. 562, 575; King vs. Egginton, 1 Term R. 370; Ryall vs. Rolle, 1 Atk. 172; Pennell vs. Deffell, 4 De Gex, M. & G. 372; *in re* Hallett's Estate, 36 Eng. R. 779, 13 Ch. Div. 696; National Bank vs. Insurance Co., 104 U. S. 54.
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> "The only difference between money and notes and bills is that money is not earmarked, and therefore can not be traced except under particular circumstances, while bills and notes, having a number and date, may generally be identified with less difficulty. It is conceded that if plaintiff could identify the particular coins and banknotes which he had deposited, he would have the right to withdraw them from the mass of coins and banknotes which passed into the hands of the receiver; but it is insisted that, inasmuch as the money deposited by him has, like water, flowed into the common mass, and so become incapable of identification, the right to pursue and reclaim it is lost, although it is admitted that the

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very coins and banknotes deposited by him constitute a part of the common mass. It is charged in the bill and admitted by the demurrer that the identical coins and banknotes deposited by the plaintiff remained in the bank when it stopped business, and came into the hands of the receiver, who now has them in his possession as a part of the general mass of coins and notes held by him as such receiver. In such a case the identification is sufficient to entitle the depositor to follow and reclaim the deposit made by him. Although the identical coins and banknotes can not be ascertained, yet, as it is admitted that so much in coins and banknotes belonging to the plaintiff is in the common mass, he is entitled, in equity and good conscience, to take so much out. If he does not withdraw from the common mass the very coins and banknotes deposited by himself, no injustice is done, for he leaves an equitable amount of his own in place of every coin or banknote deposited by another." Pennell vs. Deffell, 4 De Gex, M. & G. 372; *in re* Hallet's Estate, 36 Eng. R. 779, 13 Ch. Div. 696; Cragie vs. Hadley, 99 N. Y. 131, 1 N. E. 537; National Bank vs. Insurance Co., 104 U. S. 54; Frelinghuysen vs. Nugent, 36 Fed. 229; Peters vs. Bain, 133 U. S. 670, 10 Sup. Ct. 354; Bank vs. Dowd, 38 Fed. 172; Atkinson vs. Printing Co., 114 N. Y. 168, 21 N. E. 178; *in re* North River Bank (Sup.), 14 N. Y. Sup. 261.

In this case proof has been taken; a hearing has been had and the facts found to be that respondent has this money, without beneficial claim in himself; and that the money belongs to the bankrupt estate. We are not trying a disputed title in a court of law. We are in a court of equity; and equity goes directly to the meat of the matter; and, having jurisdiction of all the property of the debtor, whether it be in his hands, in the hands of his bank, his trust company, his clerk, agent or bailee, will order that they show cause why they shall not turn over the property, including money held on deposit or

otherwise; and if good cause be not shown, the order to turn over will be entered. Why not? If the respondent deserves trial by jury, let him question the title in a proper way. If he has n't the money, let him show it. If there be aught to say why he should not deliver, let him say it. Let him not, laughing in his sleeve, sit back and say: "'*Custodia legis*,' 'possession of the court,' 'arm of the court,' 'possession of the agent is possession of the principal,' are high-sounding phrases, but they are meaningless to me; sue me and if I lose in the suit I'll not on the execution."

How could there be conceived a greater trifling with the court? How can we patiently stop to show authority to act?

The very thought of respondent's boldness makes patience cease as a virtue. The court, with its finely drawn sense of justice, should say to respondent: "You show no claim. We have the power. Deliver."

If the Court should conclude to reverse the case, we ask that its opinion direct that the order of commitment be reinstated, or that the lower court be directed to issue a capias, or such other process as may be proper and necessary, by which respondent may be committed until he complies with the order of the referee entered October 16, A. D. 1900.

Respectfully submitted.

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